STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee/
Cross-Appellant,

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant/
Cross-Appellee.

Supreme Court
No.: 121361 & (64)

Court of Appeals
No.: 223829

Macomb County Circuit Court
No.: 95-3319 CK

AMICUS CURIAE BRIEF OF THE MICHIGAN STATE AFL-CIO; THE MICHIGAN TRIAL LAWYERS ASSOCIATION; AND THE MICHIGAN EMPLOYMENT LAWYERS ASSOCIATION

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STATEMENT OF ISSUES PRESENTED

1. **WHETHER THE CONTINUING VIOLATIONS DOCTRINE SHOULD REMAIN VIABLE IN MICHIGAN EMPLOYMENT LITIGATION.**

   Plaintiff - cross appellant answers, "Yes."

   The Court of Appeals answered, "Yes."

   Amici curiae answers, "Yes."

2. **WHETHER DAMAGE AWARDS IN EMPLOYMENT DISCRIMINATION CASES ARE BODILY INJURIES WITHIN THE MEANING OF MCL §600.630.**

   Plaintiff - cross appellant answers, "No."

   The Court of Appeals answered, "Yes."

   Amici curiae answers, "No."

STATEMENT OF INTEREST

Amicus curiae Michigan State **AFL-CIO** is a federation of labor organizations collectively representing over 650,000 employees in Michigan who earn a living, and thereby support their families, in workplaces protected from employment discrimination by the *Elliott-Larsen* Act. One of the central purposes of the Michigan State AFL-CIO is to protect the legal rights of its affiliates and the employees they represent.

Amicus curiae Michigan Trial Lawyers Association **(MTLA)** is the Michigan affiliate of the Association of Trial Lawyers Association (ATLA). MTLA has more than two thousand members engaged primarily in litigation and trial work. The MTLA and the individuals its members represent have an interest in any important issue of law which would substantially affect the orderly administration of justice in the trial courts of this state. The MTLA is dedicated to aiding injured persons, promoting public good, and combating discrimination in all its forms.

Amicus curiae Michigan Employment Lawyers Association **(MELA)** is a voluntary bar organization comprised of attorneys who regularly represent employees in labor, employment, and civil rights disputes. MELA is the state affiliate of the National Employment Lawyers Association (NELA). One of the primary purposes of MELA is to represent, protect, and defend the interests of employees involved in workplace disputes. MELA members have represented thousands of individuals in the state of Michigan who are victims of employment discrimination.

Amici curiae AFL-CIO, MELA, and MTLA thus have a compelling interest in ensuring that the goals of *Elliott-Larsen* are protected and fully realized.

All of these organizations also recognize an obligation to assist this Court in rendering decisions on important issues of law which substantially affect the rights and interests of the citizens of this state. This case presents such issues. Amici recognize that the citizens of Michigan have an inalienable interest in having the civil rights laws applied and enforced in the manner intended by the Legislature of this state. The public will be significantly harmed if employers are permitted to engage in a pattern or policy of discrimination against employees, albeit in a masked form that would be difficult or impossible to prove in litigation based on an isolated incident, and thus, insulate themselves from judicial scrutiny.

Amici respectfully believe that this brief will assist the Court in appropriate interpretation of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 *et. seq.*, and in continuing to honor the clear legislative mandate of working toward a workplace free from discrimination.

INTRODUCTION

Amici curiae AFL-CIO, MTLA, and MELA submit this brief in support of plaintiff Sharda Garg, who worked for Macomb County Community Mental Health Services for 17 years, and after opposing discrimination was subjected to a pattern of retaliatory denial of 18 promotions, for which Garg applied and was qualified. At trial, Garg also presented evidence of a continuous and escalating hostile work environment.

In its April 15, 2004 Order, this Court granted the applications for leave to appeal, and directed the parties to brief numerous issues. Amici will address two of those issues:

> (3) Whether the continuing violations doctrine *of Sumner v Goodyear Tire & Rubber Co.*, 427 Mich 505 (1986), should be preserved, modified, or abrogated in light of the language of the statute of limitations, MCL 600.5805 (1), and the United States Supreme Court's decision in *Nat'l Rail Passenger Corp. v Morgan,* 536 US 101 (2002), and
>
> (4) Whether plaintiff received an award of future damages within the meaning of 600.6013(1), thus barring prejudgment interest on that amount.

Amici urge this court to neither modify nor abrogate the continuing violations doctrine of *Sumner,* but to instead preserve the well-reasoned and specific analysis which is consistent with the intent of the Michigan Legislature to deter discrimination in the workforce. Alternatively, this Court should adopt the *Morgan* holding concerning the hostile work environment claims, and modify the holding on "discrete acts." This court should also clearly establish that all alleged discriminatory evidence is admissible as background evidence, even if some is labeled as "discrete acts" or outside a statutory time period.

Amici further submit that plaintiff did not receive an award of future damages within the meaning of MCL 600.6013(1), and thus, prejudgment interest is not barred on any amount.

An observation by the Third Circuit Court of Appeals in a Title VII case is equally applicable in this case:

> In many respects, the facts of this case represent what has become the typical . . . employment discrimination case. . . Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare.
>
> . . .
>
> Regrettably, however, this in no way suggests that discrimination . . . is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind.

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3rd Cir. 1996).

STATEMENT OF FACTS

Amici curiae adopt the Statement of Facts set forth in Plaintiff-Appellee/Cross Appellant's brief to this Court.

ARGUMENT

I. THE CONTINUING VIOLATIONS DOCTRINE SHOULD REMAIN VIABLE IN MICHIGAN EMPLOYMENT LITIGATION AND *SUMNER* SHOULD NOT BE MODIFIED OR ABROGATED.

Nearly 20 years ago, the Michigan Legislature promulgated the Michigan Elliott-Larsen Civil Rights Act. MCL 37.2101, *et seq.* The Legislature made clear that jurisdiction is appropriate in the circuit court; described the damages that are available under the civil rights statute; and consciously elected not to include any statute of limitations language. MCL 37.2801. Since that time, Michigan courts have continued to recognize that civil rights cases seek to vindicate a state policy of great importance - deterrence of discrimination in the workplace.

Nearly a decade after Elliott-Larsen became effective the Michigan Supreme Court held that the continuing violations theory was a viable doctrine in the state of Michigan. *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505 (1986), Because many claims of both discrimination and retaliation are simply incapable of being appropriately analyzed as separate and individual piecement acts, Michigan courts have remained firmly intent on following the legislative mandate to protect employees from discrimination in their workplace. The *Sumner* doctrine has been carefully applied in numerous cases, and today, remains an essential doctrine. Amici firmly believe that since 1986, both trial and appellate courts have carefully evaluated employment claims and have not been at all hesitant to find the continuing violation doctrine inapplicable in a large number of cases.

Nonetheless, as in the instant case, when a continuous policy or pattern of retaliatory refusal to promote exits, courts have recognized that application of the

continuing violations doctrine is appropriate and necessary. It has long been recognized in Michigan jurisprudence that Elliott-Larsen is a remedial statute, and must be liberally interpreted in order to **protect** the persons intended to be benefitted. *Dudewicz v Norris - Schmid, Inc.*, 444 Mich 68 (1993). The Michigan civil rights statute must not be turned on its head and interpreted to protect **employers**, at the expense of employees.

The continuing violations doctrine permits a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitations period, to be actionable as a corpus of discrimination and not just be pigeonholed as a single discrete act of discrimination. "Like acts of discrimination based on race, gender, or handicap, acts of discrimination based on retaliatory conduct may occur in a manner that makes it difficult to state the precise date of their occurrence." *Phinney v Perlmutter,* 222 Mich App 513; (1997).

In light of this, the continuing violations doctrine should remain viable in situations where the alleged perceived wrongs are not clearly a single discrete discriminatory or retaliatory act, which can alone demonstrate a prima facie case of discrimination or retaliation, but which rather occur over the course of time and constitute discrimination or retaliation only when viewed in the aggregate.

In 2002, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), the United States Supreme Court affirmed the importance of the continuing violations doctrine in hostile work environment claims under Title VII. The Court reasoned that by their nature, hostile environment claims are not discrete acts, but rather such claims consist of repeated conduct, which occurs over days, months, and even years, not on any

one particular day. Thus, the timely filing requirement for hostile environment claims brought under Title VII requires only that one act have occurred within the statutory time period. As long as this is true, then all prior acts of discrimination will be actionable as well. 536 U.S. at 2074.

The *Morgan* Court also found that because of **the language of Title VII** the continuing violations doctrine was not a viable theory under federal law in termination, failure to promote, denial of transfer, or refusal to hire cases. *Id.* at 2073-74. In analyzing whether, and if so to what extent, the *Morgan* holding should apply to Elliott-Larsen claims, it is essential to pay close attention to the difference in language between the federal and our state statutes.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et. seq.*, provides: "A charge under this section ***shall be filed*** within one hundred and eighty days *after the alleged unlawful employment practice occurred.*" §2000e-5(e)(1) (emphasis in original). The *Morgan* court reasoned that the word "shall" in the federal civil rights statute means mandatory, and thus acts which are discrete actionable events occur on a specific day, and an employee who is terminated, denied a promotion or transfer, or is refused hire must file a charge of discrimination within Title VII's 180 (or 300) day time period after the discriminatory act occurred.

As discussed **infra** in section B, Elliott-Larsen contains **no statutory filing language.** The choice to omit any timely filing language in Elliott-Larsen was conscious, and not a mere oversight, as both its predecessor, the Fair Michigan Employment Practices Act, MCL 423.301 *et. seq.* , and its previously enacted federal counterpart, Title

VII, both contained specific language about timely filing. Because of the stark difference between the language in Elliott-Larsen and the language in Title VII, reliance on *Morgan* provides no viable basis for abrogating the continuing violations doctrine in Michigan.

This Court should continue to find the continuing violations doctrine is a viable theory in Michigan, because "**many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur.**" *Sumner,* at *377.*

As it has done in other recent employment cases, this Court should honor the intent of the Michigan Legislature which carefully selected which language to include in, and which language omit from Michigan's civil rights statute. As it has also done in the past, this Court should honor the principle of *stare decisis.* In *Haynie v The State of Michigan and The Michigan Department of State Police*, 468 Mich. 302, 314 (2003), this court recognize that "[overruling] precedent must, of course, be undertaken with caution, and must only be done after careful consideration of the effect of *stare decisis*. That is, courts must consider "(a) whether the earlier decision was wrongly decided, and (b) whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen." (citation omitted). There is no compelling reason to even modify *Sumner,* let alone accept the outrageous suggestion of amicus curiae attorney general; to abrogate *Sumner.*

"Discrimination is an evil that should not find shelter behind short filing periods whose leaks have been partially plugged, in the wake of *Morgan*, by restricting the scope of the continuing violation doctrine." Wright, "Civil Rights-Time Limitations for Civil Rights

Claims-Continuing Violations Doctrine." 71 Tenn. L. Rev. 383 (Winter 2004).

A. THIS COURT HAS RECOGNIZED THAT IT IS NOT COMPELLED TO FOLLOW FEDERAL COURT INTERPRETATIONS.

This Court has previously emphasized the critical importance of focusing specifically on the language of Elliott-Larsen, when evaluating employment discrimination claims.

> We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. However, we have generally been careful to make it clear that **we are not compelled to follow those federal interpretations**. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature...'as gathered from the act itself.'"

Chambers v. Trettco, Inc., 463 Mich. 297, (2000) (citations omitted).

In *Chambers,* this Court declined to follow the U.S. Supreme Court decisions in *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Court opined that the holdings were contrary to Michigan law and would significantly change the current approach to determining employer vicarious liability for sexual harassment. The current Michigan Supreme Court majority noted that its obligation was "to ascertain and give effect to the intent of the Legislature" and its role was limited to "interpreting statutes," not "legislating the matter." *Chambers*, at 314-315.

In this case, the Court again has the opportunity and responsibility to ascertain and give effect to the intent of the Legislature by focusing on the language of Elliott-Larsen. If the court chooses to modify the continuing violations doctrine in *Sumner,*

it then should adopt only the portions of *Morgan* that are consisted with the language of Elliott-Larsen and modify the portions that contravene the plain language of Michigan statutory law.

B. IF THIS COURT DOES NOT PRESERVE THE *SUMNER* HOLDING, *MORGAN'S* ANALYSIS REGARDING "DISCRETE ACTS" SHOULD BE MODIFIED IN MICHIGAN AS MANY EMPLOYMENT DISCRIMINATION CLAIMS BROUGHT UNDER ELLIOTT-LARSEN DO NOT INVOLVE A "DISCRETE ACT."

The Michigan Elliott-Larsen Civil Rights Act, P.A. 1976, No. 53, was approved by the governor on January 13, 1977 and became effective on March 1, 1977. The language carefully selected for the preamble, describes its purpose:

> AN ACT to define civil rights; to prohibit discriminatory **practices, policies**, and customs in the exercise of those rights . . . to prescribe the powers and duties of the civil rights commission and the department of civil rights; to provide remedies and penalties; and to repeal certain acts and parts of acts. (Emphasis added)

Because the Legislature elected to use the words "practices" and "policies," and **not** to use the word "acts," this choice must not be overlooked. "Practice" is defined in Webster"s Encyclopedic Unabridged Dictionary of the English Language (Thunder Bay Press, 2001): "to do something habitually or as a practice." Likewise, "policy" is defined as "1. a definite course of action adopted for the sake of expediency, facility, etc., ... 2. a course of action adopted and pursued...".

Although not cited in *Sumner*, these definitions comport logically with the continuing violations doctrine. In fact, the *Sumner* court found that adoption of the

continuing violations doctrine was "in keeping with the letter and spirit of our statutes as well." 427 Mich. at 54. This court recognized that when an employee adequately alleges a discriminatory systematic **policy** , or a continuing course of discriminatory conduct i.e. a **practice**, "the application of which extended into the period of limitation, and that the occurrences within the period were themselves discriminatory," then the continuing violations doctrine should apply. *Id.* at 547.

The *Sumner* court emphasized that this approach is in keeping with the intent of Elliott-Larsen to protect employees, but by no means leaves employers without protection as well. "(T)he mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation... the central questions are whether (there is) a present violation and whether it was sufficiently connected to the "earlier discriminatory or retaliatory conduct." *Id.* at 539.

In addition to the language of the preamble, a remarkably significant omission in Elliott-Larsen must not be overlooked. Prior to the enactment of Elliott-Larsen, its predecessor, the Michigan Fair Employment Practices Act (FEPA), MCL 423.301, *et seq.* contained an administrative remedy, somewhat similar to that contained in its federal counterpart, Title VII of the Civil Rights Act of 1964. The FEPA required that a charge of discrimination be filed with the Michigan Civil Rights Commission within 90 days of the discrimination.

In *Pompey v General Motors Corp.*, 385 Mich. 537 (1971), a plaintiff who had not filed a timely complaint with the Michigan Civil Rights Commission was not

precluded from maintaining a civil suit against his employer. This court held the time period in the statute should not prevent a judicial remedy for redress of the plaintiff's civil rights to be free from discrimination in private employment. The court found that a cumulative judicial remedy could be maintained, in circumstances similar to Pompey's, where his complaint did not assert entitlement to the statutory remedy provided in the FEPA.

Thereafter, in *Holmes v Haughton Elevator Company*, 404 Mich. 36 (1978), the court held that although there had been no common-law remedy for race discrimination in private employment, there was support "in civil rights cases for an exception to the general rule that where a new right is created or a duty is imposed by statute, the statutory remedy provided for enforcement is exclusive." *Id.* at 42.

In his concurring opinion in *Holmes*, Justice Moody discounted any suggestion that by extending *Pompey*, the court was "adding to an already over crowded court docket." *Id.* at 45. The concurrence continued that there are "essential issues to be addressed in civil rights matters. As the United State Supreme Court has recognized congressional intent to give the `highest priority' to civil rights claims,...this Court should do no less." *Id.* (citation omitted). That noble obligation continues today.

1. Elliott-Larsen Does Not Contain Timely Filing Language, Whereas Timely Filing Language Is Explicit In Title VII

Under Elliott-Larsen, an employee does not have the same filing requirements as a complainant does under Title VII. Title VII requires that the complainant file a charge of discrimination with the EEOC within 180 or 300 days after the

discriminatory practice. Elliott-Larsen includes no provision regarding when a claim must be filed, but instead provides that a person may bring a civil action for appropriate injunctive relief or damages, or both, in the circuit court. MCL 37.2801. The first case to address the statute of limitations is Michigan came seven years after the inception of the Elliot-Larsen. In *Mair v Consumers Power Company*, 19 Mich. 7 (1984), the court noted that the parties did not dispute that a three year statute of limitations was applicable.

Elliot-Larsen does not require that a complainant file a charge of discrimination with either the state or federal agency. Instead, our statute focuses on the responsibilities of the employer:

> (1) An employer shall not do any of the following:
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
> (b) Limit, segregate or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of race, color, national origin, age, sex, height, weight, or marital status... MCL 32.2202.

On the other hand, Title VII of Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 USC 2000e *et seq*. Section 706 contains specific mandatory statute of limitation language:

> (e)(1) A charge under this section **shall be filed** within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the **date, place** and circumstances **of the alleged unlawful employment practice**) shall be served upon the person against whom such charge is made within ten days

thereafter... (Emphasis added)

Because the timely filing requirements of Title VII are absent from Elliott-Larsen, the holding in *Morgan* should not be engrafted into Michigan jurisprudence. Succinctly put, *Morgan* conflicts with both the letter and spirt of the Michigan civil rights statute.

2. THE MICHIGAN STATUTE OF LIMITATIONS REQUIRES THAT A PERSON **WAIT** TO BRING SUIT UNTIL THE CLAIM FIRST ACCRUES; STATE COURT IN EMPLOYMENT DISCRIMINATION CASES, THERE IS NO BRIGHT LINE FOR WHEN A CLAIM WILL ACCRUE.

In its Order, this Court directed the parties to also brief whether *Sumner* should be preserved, modified or abrogated in light of the language of the statute of limitations, MCL 600.5805(1). The specified statute provides that:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, **after the claim first accrued to the plaintiff** or someone through whom the plaintiff claims, the action is commenced within the period of time prescribed by this section. . ..
>
> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

The language of this statute thus requires that a plaintiff who desires to file suit, must wait until the claim accrues. "Accrue" is defined in Webster's II New College Dictionary (1995 ed.) as follows: "To become an enforceable or permanent right." A similar definition is found in Black's Law Dictionary (8th ed. 2004), "To come into existence as an enforceable claim or right; to arise." In this context, "accrue"

signifies that there are prior acts, but those acts on their own do not independently amount to a legal cause of action. Nonetheless, when prior acts are aggregated with current acts to create a compilation or series of acts, they are then sufficient to constitute an actionable claim.

In his brief, the Attorney General emphasizes statutory language that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. The question then becomes how to define "the wrong" upon which a claim of discrimination or retaliation is based. Quite obviously, the "wrong" upon which an employment discrimination claim is based must be sufficient to create a viable cause of action. Thus, in employment litigation, a claim of discrimination or retaliation accrues at the time the plaintiff can establish a *prima facie* case.

Michigan courts have continued to hold plaintiffs to a high standard in order to establish a *prima facie* case of discrimination. "The modified McDonnell-Douglas *prima facie* approach requires an employee to show that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Michigan Bell Telephone Company*, 455 Mich. 688 (1997) After the employer produces evidence of a nondiscriminatory reason for the adverse action, the presumption of discrimination evaporates. At that point, the plaintiff must come forward with evidence sufficient to permit a reasonable factfinder to conclude that the

discrimination was defendant's true motive in making the adverse employment decision. *Id.* at 696. This Court is well aware of the increasingly high hurdles courts have imposed on employees both an adverse employment action and similarly situated comparatives. A single discrete act generally will not suffice to support a *prima facie* case

In *Sumner*, the court described a well established principal in Michigan law: "a cause of action does not occur until an injury has occurred." 427 Mich. at 533. It makes sense to recognize that a claim accrues when the person "knows of the act which caused his injury, and has good reason to believe that the action was improper or done in an improper manner." *City of Huntington Woods vs Wines*, 122 Mich. App. 650, 652 (1983)(citation omitted).

In a failure to promote case, the principle elucidated in *Sumner* is that "many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur." 427 Mich. at 525. Denial of promotion cases are "by their nature violations that take place over an extended period of time...While failure to hire occurs on a particular day, failure to promote on a prohibited basis "invariably arises during a lengthy period of time...Promotion systems, unlike hiring systems, produce effects that may not manifest themselves as individually discriminatory except in culmination over a period of time." Cheng, *National Railroad Passenger Corp. v Morgan*: A Problematic Formulation Of The Continuing Violation Theory, 91 Calif L Rev 1417, 1441 (2003).

In employment litigation, it cannot be disputed that there are number of discrete acts of discrimination/retaliation where the harm is definite and immediate. In those situations, the cause of action accrues at the time of the discrete act. Examples of such situations include: termination, quid pro quo sexual harassment, failure to hire, etc. All of these discrete acts are explicitly included in the language of Elliot-Larsen itself:[1]

> (1) An employer shall not do any of the following:
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
> (b) Limit, segregate or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of race, color, national origin, age, sex, height, weight, or marital status...

MCL §37.2202.

Likewise, there are situations in employment discrimination where the magnitude of the discrimination does not reach an actionable level until a series of discriminatory acts are aggregated. An example of this is a denial of promotion situation where the employee is passed over for a promotion once, maybe twice. Upon the first failure to promote an employee may have no reason to know that she had been discrimatorily passed up for a promotion. In fact, an employer may explain why this one promotion denial was arguably justified. When the employee questions

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[1] Elliot-Larsen does not include "fail or refuse to promote."

the decision made by the employer, the employer suggest that if she takes certain actions i.e., be patient, get a specific degree, receive training in a specific area, etc., a future promotion may be forthcoming. At the next opportunity the employee is again denied the promotion, even though she followed her employers suggestions.

In such situations, the employee accepts the employer's assurances and is lulled into believing that with due diligence she will receive a promotion. This attempt at internal resolution, as opposed to rushing to the courthouse, should be lauded. Eventually, after a series of promotion denials, when employees of a different race, sex, religion, or other protected basis are continually promoted, it becomes painfully clear that the employee will never receive a promotion. It is only after a series of denials that the employee becomes aware of the discrimitory hiring/promotional policy or course of conduct. That is precisely what happened to Sharda Garg.

The plaintiff then has reason to know that she has been discriminatorily deprived of "an employment opportunity." This is what Elliott-Larsen forbids employers to do. At this point, a viable claim of discriminatory failure to promote has accrued.

The Attorney General explicitly endorses the principle that "the whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts." (Amicus Brief of Michigan Attorney General, p.38) (citation omitted). In its brief, defendant-appellant clearly dispels any such fear, when it explicitly describes the enormous amount of witnesses and evidence which defendant presented at trial in this case.

Furthermore, if this Court were to adopt the Attorney General's position, then plaintiffs would have to file a suit immediately after the first act of discrimination without ensuring that their claim was ripe. This would flood the courts with a multitude of suits, many of which may not be viable, but which would have been filed in a preemptive manner to preserve the plaintiff's cause of action.

C. THE HOLDING OF *MORGAN* CONCERNING HOSTILE WORK ENVIRONMENT CLAIMS SHOULD BE ADOPTED IN MICHIGAN AS SUCH CLAIMS NECESSITATE APPLICATION OF THE CONTINUING VIOLATIONS DOCTRINE.

The United States Supreme Court has cogently described what a hostile work environment involves:

> Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 22-23 (1993).

Michigan courts have long recognized that "[b]ecause a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment... a plaintiff usually must prove that (1) the employer failed to rectify a problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur." *Radke v Everett*, 442 Mich 368, 395 (1993).

> "A hostile work environment claim is actionable, only when, in the totality of the circumstances, the work environment is so

> tainted by harassment that a reasonable person would have understood that the defendant's communication had either the purpose or effect of substantially interfering with the plaintiff's employment or subjecting the plaintiff to an intimidating, hostile, or offensive work environment."

Id. at 398.

In *Morgan*, the Court held that the continuing violations doctrine should apply in hostile work environment claims. The *Morgan* court reasoned that because hostile work environment claims, by their nature, involve repeated conduct that constitutes an unlawful employment practice, they are a very different type of claim from a discrete act. Hostile work environment claims require:

> [A]n examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Morgan at 2074.

Furthermore, "[b]ecause such a claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice," it does not matter that some of the component acts fall outside of the statutory time period." *Id.* at 2067. Therefore, when "incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim." *Id.* at 2075.

The nature of a hostile work environment claim is such that the claim accrues over the course of time and is comprised of a series of events. The continuing violations doctrine recognizes that all of the events should appropriately be aggregated into one unlawful employment practice, and that the statute of limitation runs from the date of the most recent

event. For example, in *Morgan*, plaintiff presented evidence that "managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors, and used various racial epithets." *Id.* at 2076. Even though most of these incidents occurred outside the statute of limitations period, the court found that they were all part of the same actionable hostile work environment claim, as they all contributed to make Morgan's work environment unpleasant and hostile. *Id.*

Although the instant case does not involve a claim of sexual harassment hostile work environment, Mrs. Garg was subjected to a continuous pattern of retaliatory treatment, much of which was not independently egregious enough to substantiate an actionable claim. Whether characterized as a hostile work environment, or a continuous policy of discriminatory treatment, the time of accrual of the claim is remarkably similar. Application of the continuing violations doctrine is essential in situations such as this in order to deter discriminatory practices in the workplace.

At a minimum, this court should adopt *Morgan's* holding concerning hostile work environment claims.

D. ALTERNATIVELY, THIS COURT SHOULD CLEARLY ESTABLISH THAT IF SOME DISCRETE ACTS OF DISCRIMINATION ARE NOT ACTIONABLE FOR PURPOSES OF DAMAGES, ALL ALLEGED DISCRIMINATORY EVIDENCE, WHETHER LABELED "DISCRETE" OR OUTSIDE A STATUTORY TIME PERIOD, IS ADMISSIBLE AS BACKGROUND EVIDENCE

In *Morgan,* the U.S. Supreme Court found that even if some "discrete discriminatory acts" are not actionable because they are time barred, an employee can still use the prior acts as background evidence in support of a timely claim. This makes absolute sense regardless of whether the federal civil rights statute or our state civil rights statute is being

considered.

Even if this court finds that some evidence in a discrimination claim is time barred as a discrete act, that evidence, along with all other alleged discrimitory evidence, should clearly be admissible as background evidence. A recent 6th Circuit Court of Appeals case addresses this situation.

In *Sherman v Chrysler Corporation*, 47 Fed Appx 716 (6th Cir, 2002), the plaintiff, a product engineer, was hired by Chrysler Corporation to work on the steering group on the small vehicle platform. He was 43 years old at the time he was hired by Chrysler in 1988 and had 15 years of prior experience. In 1991 Sherman applied for a promotion as a Senior Engineer, but the position was given to a 28 year old. Later that same year, a position as Product Engineer Senior was created for another young engineer who was approximately 29 years old at the time.

In February 1994, Sherman applied for another Senior Engineer promotion and was again denied when the position was given to a 31 year old engineer. Sherman then filed a complaint with the EEOC alleging age discrimination. In Sherman's 1994 performance review, given on January 24, 1995, he received lower than normal reviews. Notably, although other employees received interim reviews during this time, Sherman did not and was not alerted to his deficient performance until January 24, 1995.

In April 1995, Sherman again applied for a Senior Engineering position, was again denied, and a 30 year old received the promotion. In July 1995, Sherman applied for a lateral transfer to a product engineer position for which a 35 year old engineer was chosen.

In February 1997, the EEOC issued a letter finding that Chrysler had violated the

ADEA by awarding the 1994 promotion to a younger engineer. Sherman applied for another lateral transfer to a product engineer position in 1997, but this position was also given to a younger engineer. Sherman filed suit on June 23, 1997 alleging age discrimination and retaliation in violation of both the ADEA and Elliott-Larsen.

The district court granted summary judgment as to the plaintiff's Elliott-Larsen claims based on incidents that occurred prior to June 23, 1994, holding that the claims were time-barred by the three year statute of limitations. The court then granted Chrysler's motion in limine to exclude evidence of the alleged incidents of discrimination dismissed on summary disposition.

Upon review, the Sixth Circuit Court of Appeals found that the district court abused its discretion when it excluded evidence of other discriminatory discrete acts that were time-barred, but that demonstrated a pattern of discrimination. The Court stated, "[t]here was little potential for jury confusion and the evidence of other incidents of discrimination had probative value on the question of whether Chrysler discriminated against Sherman when it denied him promotions to these positions." *Id.* at 722. Similarly, the *Morgan* court stated, "[n]or does the statute bar an employee from using prior acts as background evidence in support of a timely claim." *Morgan* at 2072.

Evidence of a pattern of discrimination should be permitted to be heard by the jury even if some earlier discrete acts are time-barred. In *Lewis v Smith*, 255 F Supp 2d 1054 (D Ariz, 2003), the court refused to allow the defendant to strike all evidence of prior discriminatory hiring. Relying on FRE 403 and 404, the Court stated, "because the evidence is probative of discriminatory motive...the evidence is directly relevant to the question of

discriminatory intent, and is not unfairly prejudicial to Defendants." *Id.* at 1062.

Likewise, in *Baker v John Morrell & Co*, 220 F Supp 2d 1000 (ND Iowa, 2002) the plaintiff requested that the court admit evidence of discriminatory acts which predated the limitations period for purposes of aiding the finder of fact in determining whether the acts that occurred within the limitations period were discriminatory. The *Baker* court stated, "acts outside the limitations period 'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Id.* at 1013, citing *United Air Lines, Inc v Evans*, 431 US 553, 558 (1997). The *Morgan* court reaffirmed the decision in *Evans* that Title VII does not bar an employee from using prior acts as background evidence in support of a timely claim.

Even if this Court finds that some acts of discrimination or retaliation are time-barred, it is essential that such prior acts be admitted as background evidence to support a timely claim of discrimination, in order to truly work toward the statutory goal of deterring discrimination in the employment setting.

II. DAMAGE AWARDS IN EMPLOYMENT DISCRIMINATION CASES ARE NOT "BODILY INJURIES" WITHIN THE MEANING OF MCL 600.6301 AND PREJUDGMENT INTEREST SHOULD BE AVAILABLE FOR ALL DAMAGES . .

In its Order, ths Court also instructed:

> The parties are directed to include among the issues to be briefed...whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgement interest on that amount.

MCL 600.6013[2] allows for interest on money judgments from the date of the complaint, except for future damages. The statute defines future damages as:

> [D]amages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering. MCL 600.6301.

The statute further defines "personal injury" as "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." MCL 600.6301(b).

Damages in an employment discrimination case do not constitute bodily injury under the meaning of MCL 600.6301 because the original injury to plaintiff is not bodily harm, but a violation of her civil rights.

In the instant case, the Court of Appeals erroneously held that plaintiff had a bodily injury because she suffered from headaches and high blood pressure as a result of the wrongful acts of defendant. The court ignored that these physical symptoms are actually manifestations of the civil rights violation committed by defendant. The jury returned a verdict because of defendant's retaliatory treatment, not because Mrs. Garg claimed personal injuries. In fact, she never complained of "bodily harm, sickness, disease, death or emotional harm flowing from bodily harm," rather she claimed damages for economic loss and emotional harm, including some physical manifestations arising form a statutory violation.

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[2]MCL 600.6013(1) states in full: Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301.

If the plain language of a statute is clear, the Court must enforce the statute as written because the Legislature must have intended the meaning clearly expressed. *Sun Valley Foods Company v. Ward*, 460 Mich. 230 (1999). The injury plaintiff suffered was an invasion of her civil rights, which is not included in the definition of "personal injury" laid out by the legislature. An invasion of an employee's civil rights is not the same as an employee suffering a bodily injury. Indeed, the sole remedy for bodily harm or personal injury that occurs in the workplace is the Workers Compensation Act. Public Act 317 of 1969.

The Michigan Elliott-Larsen Civil Rights Act, M.C.L. §37.2801, states (1) "[a] person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both...(3) [a]s used in subsection (1), 'damages' means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees." The jury in this case returned a verdict, in favor of plaintiff, for $250,000 or her retaliation claim

The Court in *Paulitch v. Detroit Edison Company,* 208 Mich. App. 656, 663 (1995), recognized that "a plaintiff is entitled to prejudgment interest when the **suit does not result** from a personal bodily injury." In *Paulitch*, the 50-year old plaintiff brought a suit for age discrimination after he was interviewed for a supervisor position and denied the promotion. The purpose of any employment discrimination lawsuit is to remedy a violation of an employee's civil rights, not any resulting physical symptoms that may manifest themselves after the discrimination took place. The Court stated:

> Plaintiff argues that the reference to future damages is not applicable to this case because future damages as defined in §6301, must result from a personal bodily injury. Because this case involved a civil rights violation, plaintiff contends he is entitled to prejudgment interest on the money judgment from

> the date of the filing of the complaint, as provided by §6013. We agree."

Id. at 661 (citations omitted). The Court went further on to say that the plain language of MCL 600.6301 means that a plaintiff is entitled to prejudgment interest when the suit does not result from a personal bodily injury.

Appellant argues that failure to defend insurance cases are analogous to the current situation. However, this argument is without merit. Defendant cites *Greenman v. Michigan Mutual Ins. Co.*, 173 Mich. App. 88 (1988), and *Ben Franklin Ins. Co. v. Harris*, 161 Mich. App. 86 (1987), as similar cases. The rule from those cases requiring physical manifestation of mental suffering to satisfy the bodily injury requirement," *Ben Franklin* at 89 (citations omitted), is simply not applicable. Nowhere in the interest statute which defines bodily injury, do the words "physical manifestation" appear. The following words are instead used to define bodily injury: "**bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm**." The statute clearly defines a personal injury, and statutory or civil rights violation are not included. A civil rights violation can **not** be defined as bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm. It is instead an intentional, willful statutory violation. Following the text of the interest statute, employment discrimination cases do not fall within the margins of excludable actions.

Additionally, because settlements or judgments in employment cases are taxable, even the Internal Revenue Service recognizes the destination between personal physical injuries and employment discrimination claims. Turning to the tax context, under 26 U.S.C. §104(a)(2), gross income does not include: "2) the amount of any damages (other than

punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." This means that any damage award or settlement on account of physical injuries or physical sickness is not included in the taxpayer's gross income, making it non-taxable. Since passage of the Small Business Job Protection Act in 1996, damage awards in employment discrimination cases, have been taxable. Both the courts and the IRS have found that the type of injuries suffered by plaintiffs in employment discrimination cases are not the type of injuries which fall within the ambit of 26 U.S.C. §104(a)(2).

In *United States v Burke* 504 US 229 (1992), the Supreme Court held that back pay received for disparate impact gender discrimination under Title VII was not excludable from gross income as damages received on account of personal injuries under former §104(a) (2) because that part of Title VII did not compensate for a broad range of traditional tort harms. In light of *Burke,* the Internal Revenue Service issued subsequently, in *Commissioner v Schleier*, 515 US , LED. 2D 115 SCT 2159 (1995), the Supreme Court held that back pay and liquidated damages received to settle a claim under the age discrimination in Employment Act are not excludable from gross income. The ADEA does not compensate for any of the other traditional tort harms associated with personal injury and back pay is completely independent of the existence or extent of any personal injury.

In light of *Schleier,* the IRS issued Revenue Ruling 96-65, which holds that back pay received in satisfaction of a claim for denial of promotion is not excludable from gross income under §104(a) (2) because it is completely independent of, and thus is not damages received on account of, personal physical injuries or physical sickness under that section. **(Exhibit A)**

Similarly, amounts received for emotional distress in satisfaction of such a claim are not excludable, except to the extent they are damages paid for medical care attributable to emotional distress. If on the one hand, employment discrimination awards are taxable because they are not characterized as physical injuries or sickness, then on the other hand, they can not be characterized as bodily injuries within the meaning of MCL 600.6301.

Considering the language of the interest statute, the definition of "bodily injury," and the nature of civil rights claims, amicis curaie urge this Court to reverse the holding of the Court of Appeals on the interest issue, and allow interest on the entire damage award from the date the complaint was filed.

RELIEF REQUESTED

Amici urge this court to neither modify nor abrogate the continuing violations doctrine of *Sumner,* but to instead preserve the well-reasoned and specific analysis which is consistent with the intent of the Michigan Legislature to deter discrimination in the workforce. Alternatively, this Court should adopt the *Morgan* holding concerning the hostile work environment claims, and modify the holding on "discrete acts." This court should also clearly establish that all alleged discriminatory evidence, is admissible as background evidence, even if some is labeled as "discrete acts" or outside a statutory time period.

Amici further submit that plaintiff did not receive an award of future damages within the meaning of MCL 600.6013(1), and thus, prejudgment interest is not barred on any amount.

Respectfully submitted,
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